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No. 88-810

IN THE
SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1988

DISTRICT OF COLUMBIA,

Petitioner,

v.

DONALD R. PARKER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF PETITIONER

PETER L. ZIMROTH,
Corporation Counsel of the
City of New York,
Attorney for Amicus Curiae
City of New York,
100 Church Street,
New York, New York 10007.
(212) 566-4333 or 4581.

LEONARD J. KOERNER,*
STEPHEN J. McGRATH,
ELLEN B. FISHMAN,
of Counsel.

*Counsel of Record

January 3, 1989.

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INTEREST OF THE AMICUS CURIAE

Like many other communities across the nation, the municipal government of the City of New York maintains a police force for the

protection of the general public. Police officers in this densely populated urban center face particular challenges, as they are called upon to exercise their judgment quickly, in a wide variety of situations each day. Split-second decisions regarding the use of deadly force are among the most difficult determinations that police officers make in the line of duty.

The City of New York is very much concerned about the practical implications of the Court of Appeals holding in this matter of vital public interest. The decision of the Court of Appeals for the District of Columbia Circuit significantly expands municipal liability under 42 U.S.C. §1983. It appears to be in conflict with recent, controlling precedent and with the decisions of other Courts of Appeals. Accordingly, the City of New York respectfully submits this brief, pursuant to Rule 36.4 of the rules of this

Court, in support of the District of Columbia's petition for a writ of certiorari.

ARGUMENT

THE WRIT SHOULD BE GRANTED IN ORDER TO CLARIFY THE APPLICABLE STANDARD FOR POLICE USE OF DEADLY FORCE, SO THAT LOCAL AND MUNICIPAL GOVERNMENTS MAY BE GUIDED IN THEIR POLICIES AND TRAINING PRACTICES IN THIS SENSITIVE AREA.

In the instant case, review by this Court is warranted because the issues presented are recurring ones of public importance and nationwide significance. The Court of Appeals for the District of Columbia Circuit has affirmed a judgment pursuant to a jury verdict finding, inter alia, that petitioner "had a policy, custom or practice which directly resulted in the deprivation of Don Parker's constitutional right without due

process of law . . . " (App. 61a, 64a).[1] The Court of Appeals upheld the District Court's imposition of liability and award of damages under 42 U.S.C. §1983, as construed by this Court in Monell v. New York City Department of Social Services, 436 U.S. 658, 691 (1978).

In so ruling, the Court of Appeals let stand a verdict based in large part on expert testimony advocating a stricter standard for police use of deadly physical force than this Court held to be constitutionally required in Tennessee v. Garner, 471 U.S. 1 (1985). Respondents' experts opined, inter alia, that a police officer may use deadly force only when he

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[1]Unless otherwise indicated, numerical references in parentheses denoted "App. ___" refer to pages in the Appendix to Petition for Writ of Certiorari filed by petitioner herein.

sees a weapon in the hands of an adversary and that the subject incident revealed deficiencies in petitioner's training, supervision, and disciplinary policies. The new standard countenanced by the Court of Appeals is a departure from relevant precedent in this Court and other appellate Courts. See, e.g., City of Springfield v. Kibbe, 480 U.S. 257 (1987)(per curiam); City of Los Angeles v. Heller, 475 U.S. 796 (1986)(per curiam); City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985) (plurality); Sherrod v. Berry, 856 F.2d 802 (7th Cir. 1988); Ford v. Childers, 855 F.2d 1271 (7th Cir. 1988); Dodd v. City of Norwich, 827 F.2d 1 (2d Cir. 1987), cert. denied, __U.S.__, 108 S.Ct. 701 (1988); Turpin v. Mailet, 619 F.2d 196 (2d Cir.), cert. denied, 449 U.S. 1016 (1980).

In addition, the decision below endorses a significant departure from prevailing

practice among this country's police departments. The standard applied in the case at bar is one which we fear will exacerbate the risk to police officers, as well as to innocent third persons. Permitting the jury to second-guess this police officer's decision to use deadly force pursuant to his department's policy, without having instructed the jury as to the applicable constitutional standard, defies both law and logic.

In establishing policies with respect to the use of deadly force, local and municipal governments must address competing concerns, seeking to minimize the use of deadly force while accomplishing legitimate governmental goals. To this end, the New York City Police Department has carefully promulgated a written policy on the use of physical and deadly physical force. This Court's decision in Garner, supra, is an

integral component of New York City's policy, which is more restrictive than the justification standard set forth in N.Y. Penal Law §35.30 (McKinney 1987). In similar fashion, police departments throughout the nation have updated their policies and training materials to reflect the constitutional standard enunciated in Garner, supra, 471 U.S. at 11-12.

It is our understanding that this petition presents for review issues arising out of a single incident in which a police officer acted pursuant to a departmental policy which was entirely consistent with Garner and other pertinent authority. Under the facts and circumstances of this case, local and municipal governments find the imposition of liability upon petitioner to be a rude shock, having been guided in their training and policies by this Court's holding in Garner as to when deadly physical

force may be used legitimately. We urge this Court to grant the District of Columbia's petition for certiorari to clarify the correct standard to be applied in assessing municipal liability in this difficult area.

The Court of Appeals' apparent willingness to base municipal liability on expert testimony that the police should meet certain novel criteria before using deadly force is particularly disturbing. Notably, the suggestions that a police officer may not use deadly force until a weapon is seen in the suspect's hand, and that an attempt must be made to disarm the suspect by other means, conflict with police practice as we know it. This case appears to be another instance of a phenomenon that municipalities have experienced repeatedly during the decade since this Court handed down the Monell decision: the plaintiffs' Bar can obtain expert witnesses to testify to a wide

range of additional measures that, in their opinion, defendants should have implemented. See, e.g., Dodd v. City of Norwich, supra, 827 F.2d 1. While the use of deadly force in fleeing felon situations is strongly discouraged, we do not believe that the preconditions to the use of such force imposed in the case at bar are either legally required or desirable.

The subject officer, though under a mistake of fact, had reasonable cause to believe that respondent was a fleeing felon armed with a deadly weapon, that the suspect was about to use deadly physical force on the officer or a third person, and that reasonable means to apprehend the suspect and terminate the felony other than by deadly force were not available. Neither the New York City Police Department, nor any other police department with which we are familiar, would preclude the use of

deadly force in this situation until a weapon was sighted in the suspect's hand. To impose such a rule would cause a delay with potentially fatal consequences to the officer and innocent third persons.[2]

It cannot be denied that unarmed physical force is an appropriate course of conduct in certain situations. For this reason, patrol officers are routinely trained in means to disarm suspects by less than deadly force. Hand-to-hand confrontations can place police officers in extremely compromising positions, however, as their

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[2]The magnitude of the problem faced by officers on patrol may be gleaned from the most recent statistics available: during the calendar year 1987, there were 233 firearm discharge incidents involving 286 New York City police officers. In addition, during this same period, one New York City police officer was shot and killed, and five officers were shot and wounded, without returning fire. See also Sherrod v. Berry, supra, 856 F.2d at 807, n. 2.

guns and other weapons are readily exposed to the suspect's grasp in the course of such struggles.

In consideration of the dangers that hand-to-hand struggles can present, New York City police officers are not instructed to subdue supects by entering into this kind of confrontation unless they are sure that their strength and skills are adequate to defeat their adversaries decisively. Even with optimum physical conditioning and training, use of less than deadly force to subdue a suspect reasonably believed to be armed will not be a possible or prudent course to follow under certain circumstances like those presented in the instant case. Such an assessment is made perforce by the individual officer at the time of an incident.

A recent en banc decision from the Court of Appeals for the Seventh Circuit is illustrative of the scrutiny applied to a

police officer's split-second decision to use deadly force. In Sherrod v. Berry, supra, 856 F.2d 802, an officer who believed that he was apprehending an armed robber fired his revolver at the suspect when the officer observed him quickly moving his hand into his coat, as if reaching for a weapon. The fact that the suspect was ultimately found to be unarmed was held by the Seventh Circuit to be irrelevant to the jury's measurement of the objective reasonableness of the officer's use of deadly force, for which the case was remanded.

In contrast, in this case, the District of Columbia Circuit permitted respondent to prevail on the theory that police officers should be trained not to shoot a suspected felon believed to be reaching for a weapon until the officer sees a weapon in the suspect's hand. The instant petition offers this Court an excellent opportunity to

resolve whether such a standard is Constitutionally-mandated. The City of New York and police departments across the country need to know whether their training and policies on the use of deadly force must be revised to take the standard imposed below into account.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

PETER L. ZIMROTH,
Corporation Counsel of the
City of New York,
Attorney for Amicus Curiae
City of New York.

LEONARD J. KOERNER,*
STEPHEN J. McGRATH,
ELLEN B. FISHMAN,
of Counsel.

*Attorney of Record.

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